UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 03-CV-12278-JLA

MICHAEL W. PANAGAKOS,

Plaintiff

v.

WAYNE FOSTIN, individually and as Building Inspector of the Town of Fairhaven, TOWN OF FAIRHAVEN,

Defendant

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM

Defendants Town of Fairhaven and Wayne Fostin hereby respond to the Plaintiff's Supplemental Memorandum as follows:

1. The plaintiff in this action, Michael Panagakos filed a six-count complaint in Bristol Superior Court against the Building Inspector of the Town of Fairhaven, Wayne Fostin ("Building Inspector") and the Town of Fairhaven ("Town").

2. The claims against the defendants were as follows: a writ of mandamus to issue a foundation and building permit (Count I); violations of the plaintiff's right to due process and equal protection under the law under the Fourteenth Amendment to the U.S. Constitution (Counts II, III); violations of the Massachusetts Equal Rights Act (Count IV); allegations of civil conspiracy (Count V); and a request for declaratory judgment as to whether he was entitled to a building permit (Count VI).

3. On or about November 17, 2003, the defendants filed a Notice of Removal to the United States District Court.

4. On or about March 5, 2004, the defendants filed a partial motion for judgment on the pleadings. This Court allowed in part and denied in part the motion on September 29, 2004,

dismissed all federal claims from the Complaint, leaving only the state laws claims. Specifically, the Court dismissed Count I with respect to any request for a writ of mandamus for a foundation permit and Counts II-V in their entirety. The Court invited the parties to file a supplemental memorandum of law with regard to whether the plaintiff had exhausted his administrative remedies before seeking the writ of mandamus with regard to a building permit (Count I).[1]

4. One seeking administrative action must pursue and exhaust the remedy provided for such administrative procedure before he can maintain a petition for a writ of mandamus. Karl v. Wolsey Co., Inc., 324 Mass. 419, 422, 86 N.E.2d 644 (1949). Mandamus is properly denied where the plaintiff fails to exhaust administrative remedies. Holbrook v. Board of Selectmen of East Bridgewater, 354 Mass. 756, 238 N.E.2d 366 (1968).

5. In the plaintiff's supplemental memorandum, he admits that he appealed the denial of the building permit to the Town of Fairhaven Zoning Board of Appeals ("ZBA"), with respect to the zoning reasons for the denial of the building permit, and the State Building Code Appeals Board ("BCAB"), with respect to the denial of the building permit on the grounds of interpretation of the State Building Code, 780 CMR . The plaintiff further admits that the ZBA affirmed the determination of the Building Inspector and that he failed to take an appeal pursuant to G.L. c.40A §17 of the decision of the ZBA. In addition, he states that although the BCAB

[1] Although the declaratory judgment count in Count VI was not before the Court in the Partial Motion for Judgment on the Pleadings, the defendants note that the same arguments made with regard to the mandamus claim herein largely apply to the request for declaratory relief, as declaratory relief is barred as a means of avoiding the "exclusive" nature of the remedy provided by G.L.c. 40A §17 and exhaustion of administrative remedies is required prior to seeking declaratory relief. Garabedian v. Westland, 59 Mass.App.Ct. 427, 796 N.E.2d 439 (2003) ("[o]rders of public officials are not generally appropriate subject matter for declaratory judgment, if, as in the case of a building inspector, there are administrative remedies to exhaust."); Iodice v. Newton, 397 Mass. 329, 332-335, 491 N.E.2d 618 (1986) (timely appeal under G.L. c.40A §17 provides exclusive remedy for appeal of Board of Appeals' decision and precludes declaratory judgment).

agreed with the plaintiff's position (he provides no written documentation of such agreement), he elected to withdraw his appeal before the BCAB.

6. The plaintiff's failure to pursue a timely G.L. c. 40A §17 appeal of the ZBA's decision bars him from collaterally attacking the basis for it. Any challenge to the ZBA's decision is exclusively governed by G.L. c.40A §17:

> Any person aggrieved by a decision of the board of appeals or any special permit granting authority...may appeal to the land court department, the superior court department in which the land concerned is situated...by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk...The foregoing remedy shall be exclusive...

G.L. c.40A §17 (emphasis supplied); Elder Care Services, Inc. v. Zoning Bd. of Appeals of Hingham, 17 Mass.App.Ct. 480, 482, 459 N.E.2d 832 (1984) (statutory appeal is exclusive remedy); Homstead v. Town of Whately, 11 Mass.App.Ct. 985, 418 N.E.2d 356 (1981)(same); see also Neuhaus v. Building Inspector of Marlborough, 11 Mass.App. 230, 232-235, 415 N.E.2d 235 (1981) (mandamus replaced as means of obtaining enforcement against zoning violations by Zoning Act requiring appeal of Building Inspector's decision through G.L. c.40A §§8 and 15 appeal to Board of Appeals, then review of Board of Appeals' decision pursuant to G.L. c.40A §17). Mandamus is an extraordinary remedy available only in the absence of any other effective remedy. Doherty v. Retirement Bd., 425 Mass. 130, 135, 680 N.E.2d 45 (1997). The fact that an alternative remedy is time barred is insufficient grounds to warrant mandamus relief. Thayer v. Clerk of Dist. Court, 421 Mass. 1001, 652 N.E.2d 896 (1995).

7. Similarly, the plaintiff's decision to withdraw his appeal before the BCAB bars him from challenging the Building Inspector's denial because he deliberately failed to exhaust his administrative remedies. See 780 CMR 122.1 (describing appeal to BCAB from decision of local official). A party to a controversy within the exclusive jurisdiction of an administrative agency must exhaust his administrative remedies before initiating court action. See J. & J.

Enterprises, Inc. v. Martignetti, 369 Mass. 535, 539-540, 341 N.E.2d 645 (1976); Murphy v. Administrator of Div. of Personnel Admn., 377 Mass. 217, 220, 386 N.E.2d 211 (1979); Massachusetts Respiratory Hosp. v. Department of Pub. Welfare, 414 Mass. 330, 337, 607 N.E.2d 1018 (1993). The principle applies whether the party failed to resort to the administrative process or administrative proceedings are pending at the time of suit. Kelly K. v. Town of Framingham, 36 Mass.App.Ct. 483, 633 N.E.2d 414 (1994). "This doctrine enables the agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy." Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1094 (1st Cir.1989). The plaintiff's decision to withdraw his appeal before the BCAB is somewhat mystifying in light of his representation that the BCAB indicated it agreed with his position. He must, however, live with the consequences of his strategic decision to withdraw the appeal and the impact on his request for a writ of mandamus in Count I of the Complaint (and declaratory judgment in Count VI). A writ of mandamus is an extraordinary remedy and may only be used in the absence of alternative remedies. Doherty, 425 Mass. at 135. The plaintiff had an alternative remedy, but chose not to exercise it for his own reasons. His conscious to cut off his own alternative remedy does not entitle him to mandamus relief.

DEFENDANTS,

By their attorneys,

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